SUPREME COURT, U. S.

No. 1141

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In the

Supreme Court of the United States

OCTOBER TERM, 1967.

CITY OF NEW YORK, CITY OF BOSTON, CITY OF CHICAGO, CITY OF SAN FRANCISCO, and CITY OF SAN DIEGO; STATES OF HAWAII, INDIANA, ILLINOIS, MASSACHUSETTS, OHIO, OREGON, TEXAS, WASHINGTON, WEST VIRGINIA and WISCONSIN,

Appellants,

vs.

UNITED STATES OF AMERICA, HARPER AND ROW PUBLISHERS, INC., THE BOBBS-MERRILL COMPANY, INC., CHILDRENS PRESS, INC., THOMAS Y. CROWELL COMPANY, DODD, MEAD & COMPANY, INC., E. P. DUTTON & COMPANY, INC., GOLDEN PRESS, INC., GROSSET AND DUNLAP, INC., HOLT, RINEHART & WINSTON, INC., LITTLE, BROWN & COMPANY, INC., THE MACMILLAN COMPANY, WILLIAM MORROW & COMPANY, INC., G. P. PUTNAM'S SONS, RANDOM HOUSE, INC., CHARLES SCRIBNER'S SONS, THE VIKING PRESS, INC., HENRY Z. WALCK, INC. and FRANKLIN WATTS INC.,

Respondents.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Hon. ABRAHAM L. MAROVITZ, District Judge.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

This single jurisdictional statement covers appeals by ten states and their political subdivisions and by five cities[1] in eighteen closely related cases. The questions involved are identical.

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[1] The States of Hawaii, Indiana, Illinois, Massachusetts, Ohio, Oregon, Texas, Washington, West Virginia, Wisconsin and the Cities of Boston, Chicago, New York, San Diego and San Francisco. A separate appeal has been noticed and a jurisdictional statement filed by the following applicants denied intervention in these same cases: The States of Alaska and Michigan; the Cities of Los Angeles, Madison Heights, Philadelphia, Rochester and Tampa; the Boards of Education of East Orange, Linden, Newark, Passaic, and Rahway; the School Districts of Downington Area, Madison and Philadelphia and the Board of Public Instruction of Dade County (Fla.).

OPINIONS BELOW

The court below delivered no opinions.

GROUNDS FOR JURISDICTION

Nature of proceedings

The United States brought the eighteen cases under Section 4 of the Sherman Act, 15 U.S.C. § 4, to enjoin violations of Section 1 of the Act, 15 U.S.C. § 1.

Before trial the defendants and the Antitrust Division of the Department of Justice filed proposed consent judgments for approval and entry by the court below. Appellants made timely applications to intervene under Rule 24 of the F. R. Civ. Proc. to oppose entry of the proposed judgments. Intervention was denied and, with minor modifications, the judgments were entered as proposed.

Timeliness of appeal

The judgments below were entered November 27, 1967. Notices of appeal were filed January 23, 1968 in the court below, the United States District Court for the Northern District of Illinois.

Jurisdiction

Jurisdiction of these direct appeals from the district court is conferred on this Court by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. § 29, as amended. Cases sustaining jurisdiction include *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967) and *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961).

QUESTIONS PRESENTED

1. In civil antitrust cases brought by the United States, do consent judgments which include no admissions of the violations charged, or provisions of comparable import, adequately promote the objectives of the antitrust laws where the violations consist of (a) price-fixing (b) on sales to State and local governments (c) which used federal grants in part to make affected purchases?

2. When such consent judgments are presented to a district court for approval and entry, should the court grant timely applications by State and local governments to intervene under Rule 24(a) of the Federal Rules of Civil Procedure to oppose entry of the judgments?

3. If the district court denies intervention of right, is the court required nonetheless to permit intervention as a matter of discretion under Rule 24(b)?

STATEMENT OF THE CASE

In late 1965 the Antitrust Division of the Department of Justice started an investigation of suspected price-fixing in the sale of children's books. The inquiry was continued before a grand jury impanelled by the court below, documents were subpoenaed, and testimony was heard. No indictments were returned by the grand jury.

These eighteen civil suits were filed on April 18, 1967. Each named a book publisher as defendant and charged a price-fixing conspiracy between the publisher and its wholesale distributors[2] in the sale of library editions of

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[2] Wholesalers were charged with participation in the conspiracy as unnamed co-conspirators. Included as appendices are: Appendix A, the federal civil complaint in The Bobbs-Merrill Company, Inc., 67 C 613 which is typical of all eighteen complaints filed. Appendix B, the order of the court below entered on November 27, 1967, denying petitions to intervene, and Appendix C, the Final Judgment of the court below entered on November 27, 1967 implementing the stipulated consent decree of the parties. The Final Judgment reproduced is identical in all 18 cases.

children's books.[3] The complaint alleged that most of the purchases of such books were made by governmental units with public funds from local, State and Federal sources.

Consent decree negotiations between the defendant publishers and the Antitrust Division apparently started immediately. Upon learning of them, counsel for appellants sought to persuade the Antitrust Division to accept consent decrees only if they contained a limited admission of violation or a so-called "asphalt clause."[4] By such a

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[3] Such books are defined in the complaints at paragraphs 3 and 4 as:

> "... books designed for use by children of elementary and secondary school age ... in reinforced bindings sold primarily to schools and libraries, or ... which have a 'net price.'"

[4] This sobriquet derives from several Government antitrust cases involving sales to State and local governments of road paving materials. *United States* v. *Lake Asphalt and Petroleum Co. of Massachusetts,* (D.C. Mass. 1960) 1960 CCH Trade Cas. Par. 69, 835; *United States* v. *Bituminous Concrete Assn., Inc.,* (D.C. Mass, 1960) 1960 CCH Trade Cas. Par. 69, 878; *United States* v. *Allied Chemical Corp.,* (D.C. Mass. 1960) 1961 CCH Trade Cas. Par. 69, 923. The following is a representative sample of the pertinent part of such a provision excerpted from the decree in the *Allied Chemical* case, *supra*:

> "That on the basis of said limited admission the defendants signatory hereto have engaged in an unlawful combination and conspiracy in violation of Section 1 of the Sherman Act as charged in the said complaint, this adjudication being for the sole purpose of establishing the *prima facie* effect of this Final Judgment, in the suits specified below, and for no other purpose;
>
> "Each defendant is enjoined and restrained from denying that this Final Judgment has such *prima facie* effect in any such suit; provided, however, that this section shall not be deemed to prohibit any such defendant from rebutting such *prima facie* evidence or from asserting any defense with respect to damages or other defenses available to it."
>
> [Thereafter follows a description of the advantaged cases.]

clause injured governmental bodies suing to recoup their damages would have the benefit of *prima facie* evidence of the antitrust violation—just as they would following trials won by the United States pursuant to §5(a) of the Clayton Act, 15 U.S.C. § 16(a).[5]

Instead, the Antitrust Division on October 23, 1967, joined defendants in filing proposed judgments which recited that they constituted no adjudication or admission of antitrust violations. Accompanying stipulations provided that the judgments could be entered in thirty days unless the Government withdrew its consent. Within the 30 day period appellants applied for leave to intervene to oppose entry of the decrees.

Appellants pointed out that they had all been large-scale purchasers of the books in question for their educational systems and libraries. All alleged that they had filed, or intended to file, treble-damage actions against the defendants.

Appellants' principal objection to the decrees was that they did not contain an "asphalt clause" or similar provision giving governmental bodies the benefit of *prima facie* proof of the violation. Without such a provision, in appel-

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[5] "Sec. 5(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by . . . the United States under the antitrust laws to the effect that a defendant has violated said laws shall be *prima facie* evidence against such defendant in any action . . . brought by any other party against such defendant under said laws . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, that this section shall not apply to consent judgments or decrees entered before any testimony has been taken. . . ."

lants' view, the decrees neither assisted States and local units of government to obtain redress nor operated to deter others from indulging in price fixing to public bodies.

Appellants also sought certain other changes in the decrees, including clauses requiring defendants to make a) trade editions of children's books and b) sheets for prebinders, reasonably available for purchase by public bodies which might not want the more expensive library editions of certain works.

The district court heard oral argument on November 13 and 15, 1967 and on November 27, 1967, denied intervention. Treating appellants as *amici curiae*, the court rejected their arguments for an "asphalt clause" and for clauses making available trade editions and sheets for prebinders. On the same day with certain minor revisions he entered the consent judgments originally proposed.

At appellants' request the court also impounded all documents obtained by the Government in the grand jury investigation, subject to further orders by the chief judge. The Government did not oppose this request.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. Do the consent decrees adequately promote the objectives of the antitrust laws?

(a) General

The bedrock of the Antitrust Division's argument in the court below was that the only responsibility for which it could be held accountable was to obtain a decree stopping particular defendants from continuing the specific anti-competitive practices charged. Promotion of other antitrust objectives would be fringe benefits for the public which the Division need not insist on if so-called practical considerations made it inconvenient or onerous for the Division to obtain them.

Appellants believe the Division's responsibilities are much broader. In their view, once the Division has determined that a business situation calls for putting into motion the full panoply of Government antitrust machinery, it can properly accept only a decree which advances overall enforcement policy. This view is enforced by the particular nature of the antitrust violations here charged; namely, hard-core price-fixing arrangements directed against governmental agencies.

The questions argued subsequently herein are individually substantial and merit plenary consideration by the Court. But the philosophically divergent views set forth above are of even greater substance. They require resolution by this Court and guidance to the Antitrust Division and the district courts.

The same is true of a related question inherent in these cases: the extent to which the judiciary should override administrative determinations of the Antitrust Division. Some deference must of course be shown to the enforcement agency's experience and judgment. Yet the very requirement of court review and approval is a recognition that administrators can misconceive their duties, generally and in particular cases. The Division is subject to pressures which are not always consistent with the long-range public interest. Individual officials are understandably desirous of making a record of accomplishment during short terms of office. The Division must justify its own budget to Congressional committees. Both objectives have traditionally been served by reference to the number of cases handled and the won-and-lost record established. In addition, the Division, no less than other busy litigants intent on settling cases, is subject to the human temptation to gloss over the disadvantages of settlement and magnify the difficulties of trial. But district courts at present have

no standards, short of demonstrable malfeasance, to guide them in determining which decrees unduly reflect such pressures or even serious errors of judgment.

Last year in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), this Court unmistakably signaled district courts to scrutinize consent decrees more carefully and apply stricter standards than had been their wont. The Antitrust Division, however, would have that case considered as *sui generis*. *El Paso*, we are told, is applicable only to those fortuitous cases in which a consent decree has been preceded by trial, Government victory on appeal, and a mandate by this Court on the proper form of relief. The *El Paso* consent decree, however, would have been just as contrary to the public interest if there had been no earlier trial and appeal. But until this Court speaks further, such a reading will have a subtle attraction for many a district court. See, Opinion *United States* v. *First National Bank and Trust Co. of Lexington*, (D.C. E.D. Ky., December 29, 1967), 1967 Trade Cas., Para. 72.180.

Appellants' objections to the decrees in these cases are two-fold: (i) they fail affirmatively to assist injured State and local governments to recoup public funds taken by the defendants in conspiratorial price-fixed overcharges and ii) they fail affirmatively to deter price-fixing by other businesses selling goods or services to State and local governments.[5a] The considerations advanced by the Antitrust Division to justify such failures, while not frivolous, are unsubstantial in comparison.

[5a] In addition, by failing to require defendants to make available trade editions and prebinder sheets, the decrees fail to strike down a major way in which price fixing of library editions was exploited.

(b) Failure to assist State and local government damage claimants.

By enacting Section 4 of the Clayton Act to authorize treble-damage actions, Congress included a special and unusual feature to tighten and supplement the enforcement machinery of the Sherman Act. Time and again in different contexts the Court has emphasized that intent and has recognized private treble damage actions as the most effective means of antitrust enforcement. See, *e.g.*, *Leh* v. *General Petroleum Corp.*, 382 U.S. 54 (1965); *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965).

Absent truly compelling countervailing considerations, it would seem incumbent on the Executive's chief enforcement agency to assist in every way to make this enforcement weapon effective by facilitating the recovery of damages, for unless damages can in fact be recovered, the weapon is impotent.

In these cases the decrees recite that they constitute no adjudication or admission of any issue, including of course, the issue of antitrust violations. In fact it is customary in this type of antitrust consent judgment for defendants thereafter to earnestly proclaim their complete innocence of any claimed violation. Thus, persons injured are left to their own devices to prove from scratch the very violations already investigated and alleged by the Antitrust Division. Experience shows that even with aggressive use of pretrial discovery this is an expensive, time-consuming task and one beset with many difficulties, especially against determined defendants with deep pockets.

Here there are added reasons for affirmative assistance to damage claimants. By definition, the price-fixed product, library editions of children's books, is sold only to public or quasi-public bodies. And in fact the Government

complaints themselves allege that the principal purchasers are State and local governments. Appellants' damage claims are to redress injuries to their educational systems and ultimately their taxpayers, not to corporate stockholders. Concern for intergovernmental cooperation within the federal system, if nothing more, should prompt the Antitrust Division to exert special efforts to help such appellants.

Furthermore, substantial federal funds have also gone into appellants' purchases of these books through grants under the Elementary and Secondary Act of 1965, 20 U.S.C. § 821. It would be problematical, however, whether the part of such grants which went toward the purchase of library editions could be accurately determined; it is therefore unlikely as a practical matter whether such federal funds could be recovered except as part of the damages in suits by State and local governments. But upon successful conclusion of such suits, the United States might itself be entitled to participate in the recovery. That was the thrust of a recent ruling of the Comptroller General with reference to a State's recovery of damages for price-fixing of road repair material bought by the State with a combination of federal and state monies (Opinion of the Comp. Genl. B-162539, 1967 Trade Cas., Para. 72.250). Thus, vindication of the federal interest would also seem to call for special Antitrust Division assistance to appellants.

In asking the Antitrust Division and the court below to reject the decrees because they did not include an "asphalt clause," appellants were merely stating the clear appropriateness in these cases of an enforcement technique which the Antitrust Division had itself devised and temporarily made an integral part of enforcement policy but a few years ago. The technique was abandoned, apparently, only because it encountered, as might have been

expected, opposition from defendants and a single adverse district court decision. See *United States* v. *Brunswick-Balke-Collender Company*, 203 F. Supp. 657 (E.D. Wis., 1962). A few years later in *United States* v. *Ward Baking Co.*, 376 U.S. 327 (1964), this Court strongly implied that if defendants did not accept a consent decree because of Government insistence on an asphalt or other clause, their recourse lay only in going to trial on the merits, not in compelling Government acceptance of a "consent" decree to which it had not consented. Thus, the "asphalt clause" would now seem to be fully appropriate in the right cases.

(c) Failure to deter price-fixing.

With the antitrust laws, as with any other laws proscribing types of behavior, deterrence should be the primary objective of enforcement. Section 4 of the Sherman Act, under which the Government suits were brought, itself imposes on the Attorney General the duty to "prevent" as well as to restrain violations; and the same section uses the same language in conferring jurisdiction on the district courts.

Price fixing is a hard-core violation. Vertical price-fixing conspiracies such as are involved in these cases have been outlawed for nearly sixty years.[6] More than forty years ago this Court declared all collusive price fixing to be so inherently unreasonable that evidence of business justification was not even admissible.[7] Since then the Antitrust Division has brought and won, mostly by consent decrees, hundreds of price-fixing cases. Yet less than two years

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[6] *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911).

[7] *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927).

ago the chief of the Antitrust Division testified that the "great majority" of his Division's cases were still based on price fixing.[8]

The House Antitrust Subcommittee after investigation raised serious questions as to the value of the consent judgment program as an effective instrument of antitrust policy. The subcommittee determined that:

> "In addition to the compromise of adequate relief, consent settlements of antitrust cases result in a substantial lessening, if not the virtual elimination, of the deterrent effect the antitrust laws have on business operations." (Report of Subcom. No. 5, House Judiciary Committee, 86th Cong. January 30, 1959. "Consent Decree Program of the Department of Justice.")

The conclusion is inescapable that enforcement policy in price-fixing cases, in terms of achieving deterrence, has been a failure. Why? It is at least arguable that the blame lies in consent decrees of the type agreed to in the instant cases. So long as the Antitrust Division is satisfied with slap-on-the-wrist, sin-no-more, decrees, price-fixing apparently involves only acceptable businessman's risks. Unless it is done crudely, it promises profits which outweigh the possible costs of litigation and the chance that a handful of persistent damage claimants may be successful.[9]

An "asphalt clause" in consent decrees would be no cure-all. The *prima facie* case it would provide could still be

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[8] Testimony of Donald F. Turner, Ass't. Atty. Gen., Antitrust Div., before the Senate Subcomm. on Antitrust and Monopoly Hearings on S.2512, July 15, 1966, Hearings Tr. p. 95.

[9] In practice, even where such claimants have the benefit of a *prima facie* case on the violation issue, the road to recovery is long.

rebutted. But it would be a long step toward facilitating redress for injured State and local governments. Especially as its use became established Antitrust Division policy, it would tend toward taking the profit out of price fixing or, to put it differently, raising the ante for would-be price fixers.

With the volume of State and local government purchases of goods and services increasing every year, a change in the Division's policy seems imperative. Since it will not be made on the Division's own initiative, judicial intervention by way of a directive from this Court is essential in the public interest.

(d) The Antitrust Division's "countervailing considerations".

In correspondence with appellants and in the court below, the Division acknowledged some validity in appellants' arguments, but said that the many other considerations which went into enforcement policy outweighed them. What these many considerations boiled down to was this: defendants simply will not accept decrees with an "asphalt clause";[10] therefore insistence on such a clause would only result in full-scale trials, eighteen of them in the case of children's books; that would cause undue diversion of the Division's resources from more important matters. That eighteen full trials would be necessary in children's books is a questionable assumption.

This argument implies that the only reason defendants agree to consent decrees is to avoid giving damage claimants the *prima facie* case they would enjoy after a Government victory in trial. As any litigant knows, there are

[10] In the court below, this statement was supported by an assertion that the Division had asked defendants if they would accept such a clause and defendants had answered "no."

other substantial advantages to settling cases. Be that as it may, it is no doubt true that defendants would be less likely to settle if they had to accept "asphalt clauses"—particularly until insistence upon such clauses became established policy and defendants knew the Antitrust Division meant business. However, the short answer to the argument is that some added litigation would be a small price to pay for achieving real deterrence of price fixing.

Furthermore, from the standpoint of the judiciary, consent decrees which leave the question of violation open may well increase the total burden on the courts. For it will then have to be litigated in many courts by a host of damage claimants who must duplicate the exhaustive investigation and discovery the Antitrust Division has already made. It would be interesting to have comments on the Division's argument from the Coordinating Committee on Multiple Litigation of the Federal Judiciary.

The Division also relies on Congressional intent when Section 5 of the Clayton Act was last amended. Congress wanted to make the standard form of consent decree more palatable to defendants, we are told. No doubt it did, in cases where such decrees were appropriate. But that is a far cry from a legislative mandate that the Division subordinate other enforcement considerations and grant such decrees indiscriminately.

2. Appellants have a right to intervene.

Intervention as of right must be considered from July 1, 1966, the effective date of the amended Fed.R.Civ.P. Rule 24(a).[11] The amendment broadened and liberalized interventions of right by removing restrictions encountered under the old intervention rule which had been construed to require what amounted to a showing of *res judicata* effect or property in the custody of the court and subject to its disposition.

Under the amended Rule 24(a)(2) the right to intervene exists if an appellant can show (i) an interest relating to the transaction which is the subject of the action, (ii) that disposition of the action may as a practical matter impair or impede his ability to protect that interest, and (iii) that he is not adequately represented by existing parties. It is clear that appellants meet all three of these requirements. The question is substantial since in the administration of the antitrust laws, intervention provides the only effective means of presenting objections to the terms of a consent decree.

(a) Appellants have an interest relating to the transactions.

Appellants are state, city and public agencies that were substantial purchasers of library editions of children's

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[11] Rule 24(a) provides in pertinent part:

"Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

books. They are typical of the classes of public purchasers that were injured. The alleged price-fixing conspiracy caused higher prices to be established for library editions of children's books and limited the availability of trade editions and prebinder sheets, thus eroding educational programs, diverting tax funds and directly injuring the public. In consequence, appellants have a direct and immediate interest in protecting and promoting a competitive market in this field and with respect to sales generally to public agencies. In addition, appellants have already filed, or have indicated their intention to file, treble damage antitrust suits to recover damages for the alleged overcharges. As such the disposition of the federal proceeding agreed to by the parties without a determination or admission of violation is of vital concern and substantial interest to appellants.

Intervention in a government antitrust suit was recently allowed by this Court in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), a Section 7 Clayton Act case. There in a 1964 decision this Court found that El Paso and Pacific Northwest Pipeline had been illegally merged and returned the case to the district court with directions "to order divestiture without delay" (*United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 662 (1964).) A consent decree was then negotiated which in the view of many did not comply with the plan of divestiture envisioned by this Court or with the requirements of the antitrust laws.

California, where El Paso sold most of its gas, was one of the interests that sought to intervene under the old Rule 24(a) in opposition to the consent judgment and to assure that Pacific Northwest would be restored as an effective competitor. The denial of intervention was reversed by this Court, quoting with approval from *Missouri-*

Kansas Pipe Line Co. v. *United States,* 312 U.S. 502, 506, as follows:

> "'. . . where the enforcement of a public law also demands distinct safeguarding of private interests by giving them a formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion.'"

This Court found that California had an "interest" in the "transaction which is the subject of the action" which would be "adversely affected" as provided in the old Rule 24(a).

The Court held it was

> California's "interests, as part of the public interest in a competitive system, that our mandate was designed to protect." (386 U.S. at 135)

Finally, it was determined that the existing parties had fallen "far short" of representing the interest of the intervenors, in that the "United States knuckled under to El Paso and settled this litigation." (386 U.S. at 136 and 141).

This decision rendered under old Rule 24(a) and in the face of this Court's recognition in that decision of the "new version of Rule 24(a)" as quite apparently liberalizing interventions of right, clearly establishes that the denial of intervention of right was improper and in error. Briefly:

(1) Appellants represent public agencies, state and local, who were victimized by the alleged price-fixing conspiracy. In *El Paso,* California was a public agency.

(2) A hard core offense, namely, price-fixing, is involved which directly affects the public in the payment

of taxes. In *El Paso* the offense would tend to affect utility rates paid by the public.

(3) Public policy as expressed by Congress and this Court seeks federal aid and assistance to injured public bodies in their pursuit of treble damage actions as the most effective means of antitrust enforcement. Appellants have a direct interest in facilitating damage recoveries which interest is adversely affected by the district court's acceptance of the innocuous consent judgment.

(4) The public interest is decidedly involved and seriously prejudiced by the consent judgment entered.

It will no doubt be argued that this Court's recent affirmance without opinion in *United States* v. *Blue Chip Stamp Co.*, 1967 Trade Cas., Para. 72,337 (Jan. 15, 1968) supports the present denial of intervention. It seems reasonable to infer that the affirmance was based on the obvious lack of timeliness of the applications to intervene. On the merits of intervention the facts of the case are distinguishable and the *dicta* by the district court on this question appears to be erroneous. Even in *Blue Chip* the district court in discussing the interest a petitioner for intervention must show said:

> "If petitioners are appearing merely as members of the public, in the public interest, then it is incumbent upon them to establish that the Government has not acted properly in the public interest." (1967 Trade Cas., p. 84,506.)

Appellants, of course, are not "merely members of the public," but are themselves duly constituted representatives of the public entrusted to protect its interest. The acceptance of these decrees by the Antitrust Division deprives appellants of the statutory benefits of an adjudicated decision or admission in favor of the Government.

The result is that the bargain struck with the defendants by the Antitrust Division works against the interest of appellants. This draws into question whether the advantages to the public of quick settlement of these cases outweigh the benefits of the *prima facie* evidence rule obtainable either by negotiations or Government victories in the main cases. Appellants urge that determination of this question should not be left to the Antitrust Division.

Both the Government and the defendants argued below that *Commonwealth Edison Co.* v. *Allis Chalmers Manufacturing Co.*, 315 F. 2d 564 (C.A. 7th 1963) was apposite on the issue of the nature of the interest required to intervene. In that case Illinois attempted to intervene as agent or *parens patriae* of the people of Illinois who purchased electricity in a private antitrust damage action brought by a utility against manufacturers of heavy electrical equipment. The decision denying intervention was based on the lack of standing of consumers to sue for damages because of causal remoteness. Illinois, of course, could have no better standing than its purported principals.

When the opinion is read in the light of the amended Rule however it does offer support for intervention where it states:

> "The primary essential element that must exist for an applicant to intervene in a pending action as of right under Rule 24(a) Fed. R. Civ. P. is that he have a direct personal or pecuniary interest in the subject of the litigation; . . ." P. 566.

Appellants have a pecuniary interest in the damage actions they have filed and this interest stems from the transactions which are the subject of the Government suits.

(b) Appellants' ability to protect their interest may be impaired or impeded.

It is obvious, as matters presently stand, that appellants have little if anything to gain from the Government cases. Settlement of the cases by consent decrees before hearings will interdict the possibility of appellants obtaining § 5(a) Clayton Act benefits. Their applications to intervene having been denied, appellants have no standing to appeal from the decrees. Appellants' situation is best described by Professor Benjamin Kaplan, Reporter to the Advisory Committee on Civil Rules, 1960-1966, and now a member of that Committee, when he wrote:[12]

> "New rule 24(a)(2) invites us to see that the practical consequence to the applicants of being denied intervention is that they cannot stop a settlement nor, if dissatisfied with the decree entered after contest, press their contentions on appeal; they are remitted, instead, to subsequent independent private actions in which it would be hard (although not impossible) to induce the courts to grant them better relief than was accorded by the settlement."

He then advises:

> "This factor can weigh for intervention; it is a matter for consideration from case to case."

No doubt appellants can bring their own independent actions—most have done so already. The issue is whether the denial of intervention and the consequent entry of these decrees may as a practical matter impair or impede their ability to protect their interest in those actions. It is plain that the amended rule was intended to allow practical considerations to play a role in the court's determination of when intervention of right should be grant-

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[12] Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 405 (1967).

ed. The elimination of the requirement of a *res judicata* effect from the Rule permits the court to evaluate the merits of intervention, not in absolute terms of whether applicant can get his day in court sometime and somewhere, but whether his exclusion will create practical impediments which will detract from his position when he undertakes to protect his interest—and as discussed above where the intervenor's interest is a public one, applicants are entitled to a higher standard of consideration than the ordinary private damage litigant.

(c) Appellants' interest is not adequately represented by the existing parties.

Appellants have filed treble-damage actions against the defendants in separate suits based on the same violations alleged in the Government actions. Patently these defendants would not qualify to adequately represent appellants' interest in those actions. This leaves the Antitrust Division as the only existing party which could do so.

The Antitrust Divison in deciding whether to accept consent decrees or to litigate, considers factors which do not bear upon the interests of intervenors.[13] In fact, this agency has opposed appellants' motions to intervene on policy grounds as it does all such motions.[14] The Antitrust Division has disagreed with appellants about the nature and extent of the relief which the decrees should provide. In the hearing below on November 13, 1967, counsel for the Government stated that although governmental agencies had a special duty, and even an obligation, to sue for

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[13] See The Supreme Court, 1966 Term, 81 Harv. L. Rev. 69, 223-224 (1967).

[14] Letter from Donald F. Turner, Ass't. Atty. Gen., Antitrust Div., to Emanuel Celler, Chairman, House Judiciary Comm., March 17, 1967, in BNA Antitrust & Trade Reg. Rep., March 21, 1967, at X-1.

damages in situations where they are the victims of antitrust violations, they deserved no preferential consideration by the Antitrust Division over the small businessman injured in his private enterprise by such violations (Pltf. Resp. pp. 82 and 83). This lack of concern for the interest of appellants by the Antitrust Division leaves them without a friend in these actions.[15]

Why the Antitrust Division opposes intervention, and is unwilling to stand squarely on its decrees being in the public interest, is not clear. Possibly it has an unarticulated fear that an order allowing intervention would be a precedent for intervention by all damage claimants for all purposes and at all stages of Government antitrust cases. Any such fear is unwarranted. The requirements of 24(a)(2) can, and probably should, be analyzed and applied in the context of both i) the stage of a case at which intervention is sought—here when a stipulation for a consent decree is being permitted to lay over for 30 days presumably to elicit comments and objections—and ii) the public purpose and public objectives for which intervention is sought. In the instant cases intervention is not sought during trial or to participate in trial. Moreover, as noted by the Advisory Committee when Rule 24 was amended:

> "An intervention . . . may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." 39 F.R.D. 69, 111.

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[15] *Atlantis Development Corp. Ltd.* v. *United States*, 379 F. 2d 818, 825 (5th Cir. 1967).

3. The court below abused its discretion in not granting applicants permissive intervention.

Under all the circumstances brought to the Court's attention, it seems inconceivable that discretionary intervention was not granted. Rule 24(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> Permissive Intervention. "Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

Appellants' claims and the main actions involve common questions of fact and law. The claims are actually based on the violations charged in the main cases. It is then only necessary to determine whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Such a determination necessarily requires weighing the importance of the issues in the case against any substantial deprivation caused to the parties to the main action by the introduction of additional litigants. This evaluation leads to the conclusion in the present cases that the involved public interest considerations merited a full hearing despite the delay or inconvenience appellant's intervention may cause. Antitrust suits are imbued with a public interest. The effects of violations can be pervasively debilitating to the economy, and as is alleged in these cases, may be a drain on public resources. Because of the extensive influence antitrust suits can exert, it is important to proper enforcement of the antitrust laws that a full hearing be given to those directly affected by violations. This is especially true, where the

cases are to be terminated by consent decrees, originally negotiated in private between the Antitrust Division and defendants.

Liberal intervention is in line with the modern trend reflected in the recent rule changes aimed at disposing of as much controversy between as many parties as possible consistent with due process. See *Atlantis Development Corporation* v. *United States*, 379 F. 2d 818, 825 (5th Cir. 1967).

If the parties directly affected by an antitrust violation, such as appellants here, are denied effective participation in the promulgation of relief, they have no guarantee that the Department of Justice will not settle for substantially less than what is required for effective enforcement of the antitrust laws and the development of effective deterrents. Appellants urge that when they, representing tens of millions of citizens, can be benefited or adversely affected by a course of action available to the Federal Government in a case directly affecting their pecuniary interest they are entitled to be given standing in that action.

There is ample precedent for this Court to review the discretion exercised by a court below: *Sutphen Estates* v. *United States*, 342 U.S. 19 (1951); *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137 (1944).

The claim of injury to appellants here is neither speculative nor contingent on unknown factors. The impact of the violations on States and local governments as charged in the Government complaints was immediate and certain. For this reason the court below should have allowed intervention to appellants so as to assure that all phases

of the public interest here involved—the restoration of effective competition, the fulfillment of the government's obligation to enforce the antitrust laws by results that will operate as deterrents, the framing of a decree that will make alternative trade editions and prebinder sheets available, and the restitution of public funds—are accounted for in the terms and conditions under which these Government actions are terminated.

CONCLUSION

The questions here in issue are of the utmost importance to the governments of Cities, States and their local subdivisions in facilitating damage recoveries for tortious antitrust violations committed by their vendors and in deterring further similar intrusions on their public treasuries. Probable jurisdiction should therefore be noted.

Respectfully submitted,

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APPENDIX A.

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA, *Plaintiff*, v. THE BOBBS-MERRILL COMPANY, INC., *Defendant*.	CIVIL ACTION No. 67 C 613 Equitable Relief Sought Filed April 18, 1967

COMPLAINT

The United States of America, by its attorneys, brings this action against the above-named defendant and alleges as follows:

I.

JURISDICTION AND VENUE

1. This complaint is filed under Section 4 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. § 4), commonly known as the Sherman Act, in order to prevent and restrain continuing violations by the defendant, as hereinafter alleged, of Section 1 of that Act (15 U.S.C. § 1).

2. Defendant The Bobbs-Merrill Company, Inc. transacts business within the Northern District of Illinois.

II.

DEFINITIONS

3. The term "children's books" shall mean "juveniles" as generally understood in the publishing industry, referring to books designed for use by children of elementary and secondary school age.

4. "Library editions" shall mean children's books in reinforced bindings sold primarily to schools and libraries, or children's books which have a "net price."

5. The term "wholesaler" shall mean any person or company which buys library editions of children's books from publishers and resells them to schools, libraries, governmental bodies, or bookstores.

III.

THE DEFENDANT

6. The Bobbs-Merrill Company, Inc. (hereinafter referred to as "Bobbs") is hereby made a defendant herein. Bobbs is a corporation organized and existing under the laws of the State of Indiana with its principal place of business in Indianapolis, Indiana. During the period of time covered by this complaint, Bobbs engaged in the production and sale of library editions of children's books throughout the United States.

IV.

THE CO-CONSPIRATORS

7. Various companies and persons not made defendants herein participated as co-conspirators with the defendant in the combination and conspiracy charged herein and performed acts and made statements in furtherance of said

offense. Said co-conspirators include numerous wholesalers located throughout the United States.

V.

NATURE OF TRADE AND COMMERCE

8. Schools, libraries, and governmental bodies purchase over $100,000,000 worth of children's books per year of which library editions comprise sales of approximately $40,000,000. This represents the major part of the total sales of children's books in the United States. Most of these purchases are made with public funds expended by State and local governments and by the Federal Government. Substantial amounts of federal funds are made available to State and local governments for the purchase of children's books.

9. Schools, libraries, and governmental bodies purchase children's books from wholesalers and directly from publishers including defendant Bobbs; wholesalers and publishers solicit many of the same customers in their efforts to sell children's books.

10. Traditionally, schools, libraries, and governmental bodies have benefited from competition among wholesalers and publishers in the granting of discounts on purchases of children's books. Many schools, libraries, and governmental bodies buy children's books by means of competitive bids.

11. In recent years, publishers and wholesalers have classified certain children's books as "library editions" and have sold such books, withut discount, at uniform "net prices" to schools and libraries.

12. Defendant Bobbs has produced library editions and has established "net prices" on these editions. It sales of Bobbs library editions in 1965 exceeded $100,000.

13. During the period of time covered by this complaint, defendant Bobbs sold and shipped substantial quantities of library editions of children's books in interstate commerce to customers located in States other than the States from which said children's books were shipped.

VI.

OFFENSES CHARGED

14. Beginning at least as early as 1960, the exact date being to the plaintiff unknown, and continuing thereafter until the date of the filing of this complaint, the defendant and co-conspirators engaged in an unlawful combination and conspiracy in restraint of the aforesaid interstate trade and commerce in library editions of children's books in violation of Section 1 of the Sherman Act, as amended (15 U.S.C. § 1).

15. The aforesaid combination and conspiracy consists of a continuing agreement, understanding, and concert of action among the defendant and the co-conspirators to fix, maintain, and stabilize prices on Bobbs library editions.

16. During the period of time covered by this complaint, the defendant has entered into a series of contracts in restraint of the aforesaid interstate trade and commerce in library editions of children's books in violation of Section 1 of the Sherman Act, as amended (15 U.S.C. § 1).

17. The aforesaid contracts consist of agreements between the defendant and each of the co-conspirators to fix, maintain, and stabilize prices on Bobbs library editions.

18. Pursuant to and in effectuation of the aforesaid combination and conspiracy, and the aforesaid contracts,

the defendant and co-conspirators did those things which, as hereinbefore alleged, they agreed to do. Said offenses will continue unless the relief hereinafter prayed for is granted.

VII.

EFFECTS

19. The aforesaid combination and conspiracy and the aforesaid contracts have had, among others, the following effects:

(a) Prices of Bobbs library editions have been fixed, maintained, and stabilized at high, artificial, and noncompetitive levels;

(b) Price competition between defendant and the co-conspirators, and price competition among the co-conspirators, in the sale of Bobbs library editions has been suppressed and eliminated; and

(c) Schools, libraries, and governmental bodies have been deprived of the benefits of competitive bids and discounts in the sale of Bobbs library editions.

PRAYER

Wherefore, plaintiff prays:

(A) That the Court adjudge and decree that the defendant and co-conspirators have unreasonably restrained the aforesaid interstate trade and commerce in children's books, as hereinbefore alleged, in violation of Section 1 of the Sherman Act.

(B) That the defendant, its successors, assignees, and transferees, and the officers, directors, agents, and employees thereof, and all other persons acting or claiming

to act on behalf thereof, be perpetually enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining, or renewing the aforesaid offenses and from engaging in any other combination, conspiracy, contract, agreement, understanding, or concert of action having a similar purpose or effect, and from adopting or following any practice, plan, program, or device having a similar purpose or effect.

(C) That defendant, its officers, directors, agents, and employees, and its successors, assignees, and transferees, and all persons acting or claiming to act on behalf thereof, be perpetually enjoined from:

(1) Using the terms "net" or "net price" in connection with any catalogue, price list, circular, or other announcement concerning its books;

(2) Suggesting prices at which its books are to be resold by any purchaser thereof;

(3) Refusing to sell, or delaying shipments, or misdirecting shipments or discriminating in any way, or threatening to refuse to sell or delay shipments or misdirect shipments or discriminate in any way against any purchaser of its books because of the prices at which said purchaser resells or offers to resell defendant's books; and

(4) Restricting, limiting or preventing or attempting to restrict, limit or prevent any person from selling or offering to sell any books at any price, or upon any terms or conditions as such person may individually determine.

(D) That defendant, its officers, directors, agents, and employees, and its successors, assignees, and transferees, and all persons acting or claiming to act on behalf thereof, be ordered to notify in writing (1) all of its wholesaler customers that they may resell its books at any price they may choose and (2) all of the schools, libraries, and governmental bodies whom defendant solicited during the past four years that defendant does not in any way attempt to restrict or limit any person from selling or offering to sell its books at any price, or upon any terms or conditions as such person may individually determine.

(E) That the Court order defendant to annex to every sealed bid or quotation on books a written certification by an officer of defendant, or by the official of defendant having authority to determine the bid or quotation involved, that said bid or quotation was not the result of any agreement, understanding, or communication between the defendant and any publisher, wholesaler, or other competitor.

(F) That defendant be enjoined from quoting published or "list" prices, or any other price mathematically determinable by its competitors from the pattern of prices previously quoted by defendant, in sealed bids covering books to federal, state, or local governmental bodies, or to schools or libraries, where the value of books to be purchased pursuant to such bid exceeds $100,000.

(G) That the plaintiff have such other and further relief as the nature of the case may require and the Court may deem just and proper.

(H) That the plaintiff recover the costs of this action.

Dated: April 18, 1967.

/s/ Ramsey Clark
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Attorney General

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DONALD F. TURNER
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/s/ Gordon Spivack
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APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA, *Plaintiff*, v. HARPER & ROW PUBLISHERS, INC., et al., *Defendants.*	No. 67 C 612 and Related Cases 67 C 613 through 67 C 629

ORDER

Whereas, on October 23, 1967 the parties to each of the above cases filed a stipulation consenting to the entry of a final judgment therein in the form attached to the stipulation, at any time after the expiration of 30 days following that date, provided that plaintiff could withdraw its consent at any time within the period of 30 days, and

Whereas, the period of 30 days has expired and plaintiff has not withdrawn its consent, and

Whereas, subsequent to the filing of the stipulations various applications for leave to intervene in the above cases, and supplements and amendments thereto, were filed by the States of Illinois, West Virginia, Massachusetts, Michigan, Texas, Wisconsin, Hawaii, Oregon, Washington, Alaska, Indiana and Ohio, and the Cities of Chicago, San Francisco, San Diego, Boston, New York, Baltimore, Rochester, Madison Heights, Los Angeles,

Tampa, and Philadelphia, and the Boards of Education of the Cities of Chicago, Passaic, Newark, and East Orange, and the School District of Philadelphia, Downingtown Area School District, Rahway Board of Education, Madison School District, Board of Public Instruction of Dade County, and Linden Board of Education, which applications seek *inter alia* modifications in the form of final judgment and preservation of, and access to, certain documents in the custody of John E. Sarbaugh, Chief of the Midwest Office of the Antitrust Division of the Department of Justice; and

Whereas, thereafter memoranda of law were filed by the applicants for intervention in support of their applications, and by plaintiff and by defendants in response and opposition to the applications, and

Whereas, on November 13, 1967 the above cases came on for hearing on the applications for intervention; the Court heard oral argument by counsel for the applicants, for plaintiff, and for the defendants; additional modifications in the form of final judgment were orally proposed by counsel for the applicants, some of which were later submitted in writing as part of the applications for intervention; and the Court instructed counsel for plaintiff, defendants and the applicants to meet and discuss the proposed additional modifications as to whether there was any justification for including them in the form of final judgment; and

Whereas, thereafter said counsel did meet between and among themselves, on at least five separate occasions for that purpose, and

Whereas, on November 16, 1967 the above cases again came on for hearing on the applications for intervention; the Court heard further oral argument and discussion by

counsel for the applicants, for plaintiff, and for the defendants with respect to the proposed additional modifications in the form of final judgment; counsel for the applicants withdrew certain of the additional modifications they had proposed; and the Court recommended to counsel for plaintiff and the defendants that Section X of the form of final judgment be modified by additional language; and

Whereas, in accordance with the Court's recommendation plaintiff and defendants have this date orally stipulated in open Court to modify Section X of the form of final judgment so as to include as an additional paragraph at the end thereof the following:

> "Any such information evidencing a violation of this Final Judgment which adversely affects the interest of any State or local governmental agency or instrumentality shall be retained by plaintiff for a period of one (1) year from the time when it is obtained and shall be treated as impounded subject to further order of this Court which, on motion and notice to the parties and a showing of good cause by the principal law officer of any State or local governmental agency or instrumentality, may order disclosure to such officer of any part or all of such information as the Court deems proper for use by such agency or instrumentality preliminary to or in connection with an action under the federal antitrust laws."

and

Whereas, in consequence of the applications for intervention and the hearings held thereon, the Court on November 20, 1967 entered an order impounding in the custody of John E. Sarbaugh, Chief of the Midwest Office of the Antitrust Division, United States Department of Justice, certain documents then in his custody, and

Whereas, after permitting all applicants for intervention to be fully heard as amici curiae, the Court has considered all of the written and oral arguments and matters presented to it, and is duly advised in the premises,

The Court Hereby Finds:

1. That none of the applicants for intervention has an interest relating to the property or transaction which is the subject matter of the above cases, within the meaning of subsection (a)(2) of Rule 24 of the Federal Rules of Civil Procedure.

2. That none of the applicants for intervention is so situated that the disposition of the cases may as a practical matter impair or impede its ability to protect such an interest, even if it exists, within the meaning of that subsection of that Rule.

3. That such an interest, even if it exists, is adequately represented by plaintiff herein within the meaning of that subsection of that Rule.

4. That granting to the applicants leave to intervene would unduly delay and prejudice the adjudication of the rights of plaintiff and the defendants within the meaning of Rule 24(b) of the Federal Rules of Civil Procedure.

The Court Hereby Concludes:

1. That none of the applicants for intervention is entitled to intervention of right under Rule 24(a) of the Federal Rules Civil Procedure.

2. That none of the applicants for intervention is entitled to permissive intervention under Rule 24(b) of such Rules.

IT IS THEREFORE HEREBY ORDERED that all applications for intervention filed in the above cases are denied.

Enter:
/s/ A. L. Marovitz
Judge

Dated: November 27, 1967

APPENDIX C.

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA,
Plaintiff,
v.
HARPER & ROW, PUBLISHERS, INC.
Defendant.

CIVIL ACTION
No. 67 C 612

At Chicago, Illinois, in said Division and District on November 27, 1967.

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on April 18, 1967, and defendant having filed its answer thereto denying the substantive allegations thereof, and plaintiff and defendant by their respective attorneys having consented to the making and entry of this Final Judgment without admission by either party in respect to any issue;

Now, Therefore, before any testimony has been taken herein, without trial or adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby, Ordered, Adjudged and Decreed as follows:

I.

This Court has jurisdiction of the subject matter of this action and of the parties hereto. The complaint states claims for relief against the defendant under Section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II.

As used herein:

(A) "Defendant" means the defendant Harper & Row, Publishers, Inc., a corporation organized and existing under the laws of Illinois, and each of its domestic subsidiaries and each of its foreign subsidiaries when doing business through or with any reseller in the United States;

(B) "Person" means any individual, corporation, partnership, firm or other legal entity and includes wherever applicable any Federal, State or local or other governmental agency or instrumentality thereof;

(C) "Customer" means any school, library or governmental agency or instrumentality thereof;

(D) "Reseller" means any person who is engaged in the business of buying books for resale and includes any such person when acting as an agent or consignee of defendant; and

(E) Solely for purposes of Section VII(A) and (B), the term "any person engaged in the resale of books purchased from defendant" shall not be deemed to include the national distributor of paperbacks who functions as defendant's sole national distributor.

III.

The provisions of this Final Judgment applicable to the defendant shall also apply to each of its officers, directors, agents and employees and to each of its successors and assigns, and to all other persons in active concert or participation with any of them who receive notice of this Final Judgment by personal service or otherwise. This Final Judgment shall not apply to sales for use outside the United States, except for sales to or for the use of the plaintiff or any instrumentaliy or agency thereof.

IV.

Defendant is ordered and directed:

(A) Within ninety (90) days after entry of this Final Judgment, to mail a copy thereof to each of its currently active wholesale accounts which sells to customers; for a period of five (5) years after such entry to mail a copy to each such additional wholesale account to whom it sells books; and to maintain for such five (5) year period a complete list of all such wholesale accounts to whom defendant has so mailed copies;

(B) To issue a written statement to the effect that this Final Judgment prohibits the defendant from fixing, determining, dictating, approving or disapproving the customers to whom or the prices at which any reseller may sell or advertise defendant's books to any school, library or governmental agency or instrumentality, the statement to be circulated by either one of the following means:

(1) By mailing, within six (6) months after entry of this Final Judgment, to the currently active list of schools, libraries and governmental agencies

and instrumentalities to whom it mails catalogues; or

(2) By publication in an issue of *School Library Journal* published not later than two (2) months after entry of this Final Judgment.

(C) Within six (6) months after entry of this Final Judgment, to furnish plaintiff with a written statement of the form and manner of compliance with the provisions of subsection (B) of this Section IV;

(D) For a period of one (1) year after entry of this Final Judgment, to furnish a copy thereof to any school, library or governmental agency or instrumentality requesting it.

V.

For a period of five (5) years after the date set forth in this Section V, defendant is enjoined and restrained, in connection with the pricing of its books, except textbooks, from directly or indirectly, in any manner, using the words "net" or "net price" in or on such books or in any catalogue, price list, circular or other bulletin when referring to such books; provided, however, that this Section V shall not apply to any now-existing copies of such catalouges, price lists, circulars or other bulletins until July 1, 1968 or to now-existing copies of such books.

VI.

Defendant is enjoined and restrained from, directly or indirectly in any manner:

(A) Fixing, determining, dictating, approving, disapproving, or policing the customers to whom, or the prices or related terms and conditions of sale at or upon

which any reseller may have sold, sells, advertises or offers to sell any books to any customer;

(B) Suggesting (otherwise than by imprinting any price, without more, on a book jacket) to any reseller the prices or related terms and conditions of sale at which said reseller should sell, advertise or offer to sell any books to any customer;

(C) Hindering, restricting, limiting or preventing, or attempting to hinder, restrict, limit or prevent any reseller from advertising for sale, selling or offering to sell any books (1) to any customer or (2) to any customer at any price or related terms and conditions of sale individually determined by such reseller;

(D) So long as defendant sells books to resellers, refusing to sell or offer to sell or threatening to refuse to sell or offer to sell such books to, or coercing, or discriminating in the sale or shipment of any books to, any reseller because of the prices at which said reseller intends to sell or has sold any books to any customer;

(E) Inducing or suggesting to any reseller that such reseller refuse to deal with or discriminate against any third person with respect to the sale, distribution, purchase or shipment of any books to any customer; and

(F) Issuing or disseminating defendant's customer prices in any promotional material directed to resellers or in any price catalogues, lists, circulars or bulletins with respect to books sold by resellers unless such material contains a statement, in easily legible type, that any reseller is free to charge whatever price he wishes for defendant's books; provided, however, that this Section (F) shall not apply to any now-existing copies of such promotional material, catalogues, lists, circulars or bulletins until July 1, 1968.

Provided that, upon the expiration of a period of five (5) years following the date of entry of this Final Judgment, nothing contained in Section VI of this Final Judgment shall prohibit the defendant from lawfully exercising such rights, if any, or performing such obligations, if any, as it may have arising under the Miller-Tydings Act and the McGuire Act.

VII.

In addition to the prohibitions of Section VI, above, defendant is enjoined and restrained from entering into, adhering to, maintaining, enforcing or claiming any rights under any contract, agreement, understanding, plan or program with any person engaged in the resale of books purchased from defendant to:

(A) Fix, establish, maintain or adhere to prices in the sale of its books to any third person;

(B) Refuse to sell its books to any third person because of the price or prices at which, or persons to whom such third person intends to sell, advertise, or display or may have sold, advertised or displayed such books;

(C) Submit collusive or rigged bids or quotes for supplying any of its books to any third person; or

(D) Bid or quote a specific price, or refrain from bidding or quoting, on any of its books to be sold to any third person;

Provided that, subject to Section VI of this Final Judgment, nothing contained in this Section VII shall prohibit the defendant from lawfully exercising such rights, if any, or performing such obligations, if any, as it may

have arising under the Miller-Tydings Act and the McGuire Act.

VIII.

Nothing contained in this Final Judgment shall be deemed to prohibit the defendant from complying with requirements imposed upon it by State or local law or by any governmental agency or instrumentality acting pursuant to State or local law.

IX.

For a period of five (5) years following the date of the entry of this Final Judgment, defendant is ordered and directed to furnish simultaneously with each sealed bid and sealed quotation (other than a bid or quotation for a sale which will involve less than $100) submitted by it to any customer for the sale of books, other than textbooks, a written certification by the official of defendant having authority to determine the price or prices bid or quoted that said bid or quotation was not the result, directly or indirectly, of any agreement, understanding, plan, or program between defendant and any other person.

X.

For the purpose of securing compliance with this Final Judgment, and for no other purpose, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendant (which may have counsel present), made through its principal office, be permitted, subject to any legally recognized privilege, (1) access during reasonable office hours to all books, ledgers, accounts, correspondence, memoranda and other records

and documents in the possession or under the control of the defendant relating to any of the subject matters contained in this Final Judgment, and (2) subject to the reasonable convenience of defendant, and without restraint or interference from it to interview officers or employees of the defendant, who may have counsel present, regarding any such matters; and upon such request, defendant shall submit such reports in writing, under oath if so requested, to the Department of Justice with respect to any of the matters contained in this Final Judgment as may from time to time be requested for the enforcement of this Final Judgment. No information obtained by the means provided in this Section X shall be divulged by any representative of the Department of Justice to any person, other than a duly authorized representative of the Executive Branch of plaintiff, except in the course of legal proceedings to which the United States of America is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

Any such information evidencing a violation of this Final Judgment which adversely affects the interest of any State or local governmental agency or instrumentality shall be retained by plaintiff for a period of one (1) year from the time when it is obtained and shall be treated as impounded subject to further order of this Court which, on motion and notice to the parties and a showing of good cause by the principal law officer of any State or local governmental agency or instrumentality, may order disclosure to such officer of any part or all of such information as the Court deems proper for use by such agency or instrumentality preliminarily to or in connection with an action under the federal antitrust laws.

XI.

Jurisdiction is retained for the purpose of enabling either of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification or termination of any of the provisions thereof, and for the enforcement of compliance therewith and punishment of violations thereof.

Dated: November 27, 1967.

Enter:

/s/ Abraham L. Marovitz
United States District Judge